92-1362

No. 93-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ROBERT J. FOSTVEDT
Petitioner,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE OF THE UNITED STATES; NICHOLAS F. BRADY, Secretary of the Treasury; FRED GOLDBERG, JR., Commissioner of the Internal Revenue Service; G.F. SWANSON, IRS District Director; BETTY L. MOSES, IRS Special Agent; DAVID ROMERO, IRS Agent; KIM SAVAGE, IRS Agent; SUSIE SUTTER, IRS Group Manager; BETSY SALAS, IRS Agent; CLAY CARPENTER, IRS Special Agent; and other respondents not known,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

ROBERT J. FOSTVEDT
P.O. Box 7412
Colorado Springs, Colorado 80933
(719) 597-9402

Petitioner, in his proper person.

58 pp

QUESTION PRESENTED

Petitioner, Robert J. Fostvedt, respectfully seeks that this Honorable Court issue a Writ of Certiorari, and review the judgment and order of the United States District Court for the District of Colorado and the United States Circuit Court of Appeals for the Tenth Circuit. Petitioner asserts that the determination of both of the courts below has created a rule of law which effectively forecloses judicial review of administrative actions of the Internal Revenue Service. In the circumstances sought for review herein, the Internal Revenue Service offered a procedure to the Petitioner known as "Request for Technical Advice." The Petitioner accepted the opportunity to engage the IRS in the procedure. Years later, the Internal Revenue Service declared his request frivolous, dismissed the request and did not provide him notice of the appeal process. Following the IRS' determination the Petitioner sought review of the actions of the IRS under the United States Administrative Procedures Act, seeking to have the agency actions reviewed. The District Court and the Court of Appeals determined that there was no waiver of sovereign immunity and the Petition for review was dismissed in the trial court and affirmed on appeal. Under the circumstances, this creates a situation where the agency's conduct evades review. As a result of the decisions of the trial court and court of appeals, Petitioner contends that his propositions on appeal were overlooked, resulting in the adverse judgment Petitioner seeks to overturn.

All parties to the instant case are in the caption.

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JUDGMENTS AND ORDERS BELOW

The decision of the United States Circuit Court of Appeals for the Tenth Circuit appears in Appendix A to this Petition. The Final Order of the United States District Court for the District of Colorado appears in Appendix B of this Petition.

JURISDICTION

In August of 1988, the Petitioner, through counsel, sought and received an agreement with the Internal Revenue Service to accept a "Request for Technical Advice" to be submitted to the national office of the Internal Revenue Service. February of 1991, a determination letter declaring the "Request for Technical Advice" frivolous was sent by an Internal Revenue Service special agent without it having been sent to the national office for review. The Petitioner then sought review in the United States District Court for the District of Colorado of the agency's determination on his "Request for Technical Advice." The District Court determined there was no waiver of sovereign immunity and dismissed the Petition. This Order was entered on the Record July 30, 1991 and is set forth in Appendix B, hereto. The Notice of Appeal was filed with the Tenth Circuit Court of Appeal on September 24, 1991. The Court of Appeals affirmed the District Court in its decision of November 3, 1992, set forth at Appendix A, hereto. Therefore the jurisdiction of this Honorable Court are properly invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT I

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...[N]or be deprived of life, liberty, or property, without due process of law;...

STATUTES

ADMINISTRATIVE PROCEDURES ACT

5. U.S.C. § 552(a)(1)

The Administrative Procedures Act at 5 U.S.C. § 552a(e)(7) provides in pertinent part:

> Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -
>
> (A) description of its central and field organization and the established places at which, the employees ... from whom,

> and the methods whereby, the public may obtain information, make submittals or request, or obtain decisions;
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
> * * *
> (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Directory of the Federal Register.

5 U.S.C. § 552a(e)(7)

The Administrative Procedures Act at 5 U.S.C. § 552a(e)(7) provides in pertinent part:

> Each agency that maintains a system of records shall -
> (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

5 U.S.C. § 702

The Administrative Procedures Act at 5 U.S.C. § 702 provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

REGULATIONS

The regulation 26 C.F.R. 601.105(b)(5) is reproduced at Appendix C, hereto.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

The Petitioner's cause of action arose as a result of the Internal Revenue Service's (hereafter IRS) acceptance of his Request for Technical Advice. January 12, 1988, the Petitioner received what is commonly referred to as a 30 day letter from the Ogden Service Center, of the IRS. The letter contained proposed tax liability for the tax years 1982 and 1984. The letter also offered an Appeal Conference, and included

IRS Publication 5 which explained the initiation process for an appeal of the determinations contained in the letter.

On or about May 6, 1988, Special Agent Betty L. Moses notified the Petitioner a criminal investigation was begun for federal income tax liability for the years 1983, 1984, and 1985. The Petitioner then retained the legal counsel of Mr. Jeffery Dickstein to represent him with regard to the criminal investigation.

On August 16, 1988, Mr. Dickstein had a meeting in Denver, Colorado, with Betty L. Moses and her supervisor David Romero of the IRS. During the meeting Mr. Dickstein indicated the Petitioner wished a Request for Technical Advice be submitted to the National Office. Ms. Moses and her supervisor Mr. David Romero both agreed to the submission of a technical advice to the National Office. Ms. Moses advised Mr. Dickstein that she was a representative of the district director and had the authority to accept the Request for Technical Advice.

On August 29, 1988, Mr. Dickstein mailed to the Internal Revenue Service, a lengthy and detailed Request of Robert Fostvedt for Technical Advice from National Office and a Request for a National Conference.[1] Following the submission of the request, Petitioner's counsel attempted on numerous occasions to determine the status of the request.

On February 23, 1989, the Internal Revenue Service issued another 30 day letter purporting to cover the tax periods 1982, 1984 and 1985. The letter, explained the appeal rights, and offered an Appeals Conference. Petitioner contacted his counsel Mr. Dickstein and requested him to pursue this appeal and expressed concern about the 30 day letter being issued while he was still under criminal investigation and had a Request for Technical Advice pending.

On March 6, 1989, Mr. Dickstein contacted IRS, Revenue Agent Savage. Mr. Dickstein was advised by agent Savage that the National Office had refused to accept the Request for Technical Advice, however, there was never any written confirmation of this statement or notice provided to the Petitioner of his appeal rights. Agent Savage told Mr. Dickstein Petitioner was an "illegal tax protester" that his case would **not** be processed according to normal procedures. Agent Sav-

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1. The issues contained in the Request for Technical Advice are not at issue in this request for Certiorari.

age stated that the Petitioner would not receive an appeals conference.

On March 17, 1989, Mr. Dickstein, contacted the office of Robert Berkowsky, head of the Income Tax and Accounting Section of the National Office-Technical, and requested the status of the Petitioners technical advice. Mr. Dickstein was advised that there is no record of the National Office having ever received the Request for Technical Advice.

On March 20, 1989, Mr. Dickstein again contacted agent Kim Savage, and Mr. Savage indicated Petitioner had been classified an "illegal tax protester", and accordingly he would not be accorded certain administrative procedures and that Petitioner would not receive an appeals conference.

On March 24, 1989, Mr. Dickstein wrote Special Agent Moses to again inquire of the status of the Request for Technical Advice of the Petitioner and to advise her of the National Office having no record of the request being submitted and referred her to the address in Washington D.C. of Mr. Berkowsky. Mr. Dickstein also requested the removal of the classification of Mr. Fostvedt as an "illegal tax protester"; the restoration of all procedural "due process" which was denied the Petitioner; and to a determination on the Request for Technical Advice. On July 12, 1989, Mr. Dickstein wrote agent Savage requesting the status on the written protest to the Petitioner's 30-day letter of February 23, 1989, confirmation the Request for Technical Advice was to be processed and had been forwarded to the proper official at the National Office. There was no response to this letter.

On or about June 5, 1990, the Petitioner was placed under a criminal investigation by the Internal Revenue Service concerning tax years 1986, 1987, and 1988.

On September 14, 1990, Petitioner returned with a phone call to IRS Special Agent Mr. Clay Carpenter who asked to make an appointment with Petitioner. Petitioner said he would like for counsel, Mr. Dickstein, to set up the appointment and Mr. Carpenter agreed. On October 17, 1990, Mr. Dickstein advised Mr. Carpenter that Petitioner's Request for Technical Advice had not been properly processed at the National Office. Mr. Carpenter advised that he would look into the matter.

On November 5, 1990 in a letter to Mr. Clay Carpenter, Mr. Dickstein again reasserted Petitioner's legal position as stated his request for Technical Advice and incorporated the

years under investigation.

On or about February 21, 1991, the Petitioner was placed under a criminal investigation by the Internal Revenue Service concerning tax years 1975, 1976, 1977, 1978, 1979, 1980 and 1981.

On February 25, 1991, Mr. Carpenter, IRS Special Agent, responded to Mr. Dickstein's letter of November 5, 1990 stating that although two and one half years had passed since submission of Request for Technical Advice, Petitioner's request had not been properly submitted to the National Office. Carpenter advised these requests were now frivolous and do not merit a response.

The Petitioner was not provided notice of appeal rights. This denial of the Request for Technical Advice constituted a final order as defined by 5 U.S.C. §§ 551, 701, 702 and 706. The refusal to submit the Petitioner's Technical Request was a denial of "administrative due process". Petitioner made every reasonable attempt to exhaust all the administrative remedies he was aware of prior to bringing of the action in the United States District Court, District of Colorado.

The Petitioner sought judicial review of actions and administrative proceedings taken by the Internal Revenue Service with respect to the Petitioner by filing, on or about March 27, 1991, what was captioned - PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE PROCEEDINGS - with the United States District Court for the District of Colorado.

In his Petition for Judicial Review of the actions of the IRS it was alleged: Petitioner, Robert J. Fostvedt is a member of the National Commodity and Barter Association, (NCBA) which is a bona fide First Amendment association seeking to reform the present system of income tax imposition and collection; Petitioner was selected and classified as an "illegal tax protester" for accelerated processing because he was a member of the NCBA and his name appeared on a list of names which was illegally seized and which lists' use was prohibited to the IRS. *See, Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985); This IRS' maintenance of records on Petitioner's exercise of his rights guaranteed by the First Amendment in violation of 5 U.S.C § 552a(e)(7); Due to the failure to publish final Delegations of Authority, central and field organization, the general course and method by which the IRS functions are channeled and determined, including the nature and requirements of formal and informal procedures available, and to pub-

lish each amendment, revision, or repeal, pursuant to 5 U.S.C. § 552(a)(1)(A), (B) and (E), Petitioner and counsel Dickstein were without adequate notice as to which branch, division, or function to seek resolution of the denials of "due process" caused by the Respondents; The failure to comply with the APA by the Respondents adversely affected Petitioner's right to full "administrative due process"; It is and was believed by Petitioner that the letters and conversations Petitioner or Mr. Dickstein had with the IRS indicated that Petitioner was entitled to an appeals conference and that Petitioner was entitled to have the technical advice sent to the National Office. The Petition for judicial review also adequately alleged that the actions of the IRS employees were are beyond their authority and that although acting within the scope of their authority, the powers exercised, or the manner in which they are exercised, were constitutionally void for the deprivation of due process owed the Petitioner.

At no time between August 29, 1988, until the letter dated February 25, 1991 stating that Request for Technical Advice was frivolous and did not merit a response (resulting in the filing of the Petition in the District Court for Judicial Review on March 27, 1991) has the Petitioner or his counsel Mr. Dickstein received notice in writing from the District Director or any other official within the Internal Revenue Service that the Request for Technical Advice had not been referred to the National Office nor that it had been ruled upon adversely to the Petitioner. In the Request for Technical Advice, the Petitioner specifically requested any and all national conferences provided for by existing administrative procedures. The Petitioner has not received notice of the grant or denial of such conferences.

The Petitioner sought to invoke the jurisdiction of the District Court under 28 U.S.C. §§ 1331, 1340, 1361, and 1631, and the First and Fifth Amendments to the United States Constitution.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
> *28 U.S.C. § 1331*

> The district courts shall have original jurisdiction of any civil action arising under any act of Congress providing for internal revenue * * *
> *28 U.S.C. § 1340*

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.
> *28 U.S.C. § 1361*

Petitioner predicated his waiver of sovereign immunity upon 5 U.S.C. § 702.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
> *5 U.S.C. § 702*

In the District Court the United States and the named Respondents moved to dismiss the Petition on the ground that there was no waiver of sovereign immunity and consequently the District Court lacked jurisdiction. The Respondents relied on the decision in *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) for the proposition: that jurisdiction is not conferred upon the District Court pursuant to 5 U.S.C. § § 551(13) and 701 et. seq. (the Administrative Procedures Act); and that the Administrative Procedures Act only provides "that sovereign immunity will not be a defense in an action in which jurisdiction already exists." *Lonsdale, Supra*, at 1444.

The Respondents also argued, in the District Court, that the Petitioner failed to state a claim upon which relief could be granted as the controlling regulations in 26 C.F.R. Part 601.105 and 601.106 are merely operating rules for the use of the Internal Revenue Service and do not have the force and effect of law, and as such, confer no constitutional due process rights on those subject to tax investigations.

Respondents further argued that the Petitioner could state no claim for having been classified and treated differently as an "illegal tax protester"; and, that any failure to publish delegation order and field organization failed to state a claim.

The Honorable Judge Carrigan entered his order on July 30, 1991, (*See*, Appendix B, attached.) finding that the court lacked subject matter jurisdiction. The Trial Court focused on the Tenth Circuit Court's decision in *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) in deciding that the Petitioner had failed to allege statutes upon which jurisdiction could be predicated or immunity waived.

> "In *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990), the Tenth Circuit states that '[t]he Administrative Procedure Act itself is not a grant of jurisdiction for the review of agency actions.' Thus, none of the Acts provisions relied upon by petitioner waives sovereign immunity. *Id.*"
>
> *Court's Order*, (Appendix B, page 2.) July 31, 1991.

On Appeal before the Tenth Circuit Court of Appeals the Petitioner attempted to persuade the Court it did in fact have jurisdiction to review arbitrary and capricious conduct which deprived him of equal protection under the law and deprived him of due process.

Although the United States sought to persuade the Trial Court differently several courts have held, when coupled with 28 U.S.C. § 1331 the 1976 amendment to §702, of Title 5, does indeed constitute a waiver of sovereign immunity. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 725 (2nd. Cir. 1983); *Food Town Stores, Inc. v. E.E.O.C.*, 708 F.2d 920 (4th Cir. 1983); *Warin v. Director, Department of Treasury*, 672 F.2d 590, 591-92 (6th Cir. 1982)(per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980) *cert. denied.* 452 U.S. 905 (1981); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3rd. Cir. 1979), *cert. denied* 441 U.S. 961 (1979); *Burgos v. Milton*, 709 F.2d 1 (1st. Cir. 1983); *Murray v. United States*, 585 F.Supp 543 (D.C. N.D. So.Div. 1984).

The Administrative Procedures Act's, 5 U.S.C. § 701, *et. seq.*, (hereafter APA) legislative history makes it clear when Congress adopted § 702 (and at the same time amended the jurisdictional dollar amount out of 28 U.S.C. § 1331) District Courts of the United States had jurisdiction over matters identified in the APA. *Jaffee v. United States*, 592 F.2d 712 (3rd. Cir. 1979); *Tax Analysts and Advocates v. Shultz*, 376 F.Supp 889, 895-896 (D.C. Col. 1974).

> There are two exceptions to the general rule. A suit is not barred by sovereign immunity if (1) it alleges that the actions of the officers challenged are beyond their statutory authority or (2) it alleges that although acting within the scope of their authority, the powers exercised, or the manner in which they are exercised, are constitutionally void.

Crowther v. Seaborg, 312 F.Supp. 1205, 1219 (D.C. Colo. 1970)

The Tenth Circuit Court of Appeals, consistent with its ruling in *Lonsdale, Supra*, found that there was no waiver of sovereign immunity and the Anti-Injunction Act 26 U.S.C. § 7421 and the Declaratory Judgments Act 28 U.S.C. § 2201 could not be overridden by the Administrative Procedures Act. (*See* Appendix A, at pg. 5.)

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that this Court should grant Certiorari for the following reasons:

THE DETERMINATION OF THE APPELLATE COURT, CREATES A CIRCUMSTANCE WHERE THE INTERNAL REVENUE SERVICE CAN OFFER PROCEDURES TO TAXPAYERS, THEN FAIL TO COMPLY, AND THE DUE PROCESS VIOLATIONS EVADE REVIEW.

The Petitioner respectfully requests this Honorable Supreme Court to grant Certiorari to review the grant jurisdiction to the United States District Courts and the waiver of sovereign immunity by the United States under the Administrative Procedures Act. This case's substantial issue is whether or not Congress intended the Internal Revenue Service's administrative procedures to evade review. The ruling of the Tenth Circuit Court of Appeals is in error.

It is the Petitioner's contention that once an agency offers a procedure to an individual it cannot simply refuse to comply with the regulations set out for its exhaustion. If the IRS can offer a procedure for the submission of a request for technical advice, and then determine not to follow that procedure, the determination to deny the Petitioner of his due process must be reviewable. The regulation at 26 CFR 601.105(b)(5) (Appendix C.) sets out a multi-step review process.

The regulation permits that a technical advice may be submitted while under the jurisdiction of the district director.[2] Ms. Moses told the Petitioner's counsel that she had the authority to accept the request. August 29, 1988, the Request of Robert Fostvedt for Technical Advice from National Office and a Request for a National Conference was submitted to the IRS. Following this submission the IRS was obligated to determine if the request warranted referral to the National Office and so advise the taxpayer.[3] If there was in fact a determination not to refer the request for technical advice to the National

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2. 26 CFR 601.105(b)(5)(iii)(a)

3. 26 CFR 601.105(b)(5)(iii)(a)

Office and notice provided to the taxpayer of the decision, the taxpayer has the right to appeal.[4] This appeal was to have been channeled to the Chief, Examination Division, with the taxpayers reasons review should be granted and the IRS officials reasons why it should not be granted.[5] The Chief of the Examination Division is then to determine, on the basis of the statements submitted, whether or not the technical advice is warranted, and inform the taxpayer in writing of his determination.[6] The taxpayer is then to have 15 days to notify the Chief whether or not he agrees with the proposed denial. If he does not agree he may have the proposed denial, all data relating to the issue and all statements submitted to the National Office.[7]

Once the IRS agreed to accept the Petitioner's request for technical advice, the IRS was bound to proceed according to their regulation. Never once did the Petitioner receive any notification of any determination not to refer his request to the National Office prior to the February 25, 1992, letter from Clay Carpenter. Carpenter's letter (assuming arguendo he had the authority to advise the Petitioner in a matter related to a request for technical advice) did not contain the necessary notification of the right to request the Chief, Examination Division review the determination not to forward the request for technical advice as required by 26 CFR 601.105(b)(5)(iv)(a) & (b).

Additionally, if the request was sent to the National Office for determination the request that the taxpayer made for a conference was never complied with. The regulation states that "If, after study of the technical advice request, it appears that advice adverse to the taxpayer should be given and a conference has been requested, the taxpayer will be notified of the time and place of the conference."[8] The regulation continues: "A taxpayer is entitled, *as a matter of right,* to only one conference in the National Office . . ."[9] The requirements of these regulations were never complied with and the Petitioner

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4. 26 CFR 601.105(b)(5)(iv)(a) & (b)
5. 26 CFR 601.105(b)(5)(iv)(c)
6. 26 CFR 601.105(b)(5)(iv)(c)
7. 26 CFR 601.105(b)(5)(iv)(c)
8. 26 CFR 601.105(b)(5)(v)(a)
9. 26 CFR 601.105(b)(5)(v)(b)

was denied his right to procedural due process.[10]

The position of the respondent that the regulations 26 CFR 601.105 and 106 are merely operating rules for the use of the Internal Revenue Service and do not have the force and effect of law, and as such, confer no constitutional due process rights on those subject to tax investigations, if sustained, permits the IRS to deny procedural due process with impunity.

The Petitioner sought judicial review in the United States District Court based on the denial of procedural due process and other claims. Several courts have held, when coupled with 28 U.S.C. § 1331 the 1976 amendment to §702, of Title 5, does indeed constitute a waiver of sovereign immunity. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 725 (2nd. Cir. 1983); *Food Town Stores, Inc. v. E.E.O.C.*, 708 F.2d 920 (4th Cir. 1983); *Warin v. Director, Department of Treasury*, 672 F.2d 590, 591-92 (6th Cir. 1982)(per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980) *cert. denied.* 452 U.S. 905 (1981); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3rd. Cir. 1979), *cert. denied.* 441 U.S. 961 (1979); *Burgos v. Milton*, 709 F.2d 1 (1st. Cir. 1983); *Murray v. United States*, 585 F.Supp 543 (D.C. N.D. So.Div. 1984).

Respondent's contentions in the Court below regarding sovereign immunity were soundly rejected in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-874 (Emphasis added.):

> Having found the provisions of section 10 of the Administrative Procedure Act applicable, the court is persuaded that the ancient doctrine of sovereign immunity has no application. The Fifth Circuit has held that the Admin-

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10. The Petitioner notes to the Court, the process outlined here is procedural. The regulation 26 CFR 601.105(b)(5)(v)(b) states a taxpayer has no "right" of appeal from an action of a branch to the director or a division or to any other National Office official. The context of the regulation clearly indicates that the determination of the content of a technical request may not be appealed beyond the provisions set forth in the regulation. The Petitioner is not seeking review herein for what fact and law determination may or may not have been made regarding his request, but the denial of access to the procedure set out in the regulations for the making of the determination. The judicial review is about process and not the content of the request for technical advice of the Petitioner.

istrative Procedure Act, where applicable, serves as a waiver of sovereign immunity. In *Estrada v. Aherns*, 296 F.2d 690, 698 (1961), that court said:

> by providing judicial review in an action brought by "any person adversely affected or aggrieved by any agency action" congress permitted suits which under established tests would certainly be barred as suits against the government * * * *The act thereby makes a clear waiver of sovereign immunity in actions to which it applies.* (Emphasis added.)
>
> It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; ***any other construction would make review provisions illusory***.

The APA serves as a waiver of sovereign immunity for: injunctive and declaratory relief; and, review of an agency's discretionary decisions to the extent of determining if the decision was arbitrary or capricious or not supported by substantial evidence. See *Trammel v. Callaway*, 415 F.Supp 212, 215,(D.C. N.D. Miss, 1976) and cases cited therein; *Lopez v. Heckler*, 725 F.2d 1489, 1510 (9th Cir. 1984); *Califano v. Sanders*, 430 U.S. 99, 104-108 (1977).

This Honorable Court has determined that an agency of the government must scrupulously observe rules, regulation, or procedures which it has established, and when it fails to do so, the agency's action will be struck down. This doctrine was announced in *United states ex re. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and applied in *Service v. Dulles*, 354 U.S. 363 (1959); *Vitarelli v. Seaton*, 359 U.S. 535, (1959).

Petitioner also contends that judicial review is also available for the unlawful maintenance of records in violation of 5 U.S.C. § 552a(e)(7).

> Each agency that maintains a system of records shall - (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom

> the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.
> *5 U.S.C. § 552a(e)(7)*

The IRS has maintained a dossier on the Petitioner related to the exercise of his First Amendment Rights. Consequently the Petitioner is entitled to bring an action under 5 U.S.C. §§ 702 and 706.

The Petitioner adequately stated facts upon which jurisdiction could be found under 28 U.S.C. § 1331, but also under 28 U.S.C. § 1340 in the Petition filed in the District Court. The Petitioner's Petition for review comes from application of federal statutes and from the specific application of the Internal Revenue Code. Jurisdiction under 1340 in relation to the waivers of sovereign immunity under 5 U.S.C. §§ 702, 703, 704, 705 and 706 is no different than between 28 U.S.C. § 1331 and the APA.

The United States District Court, District of North Dakota, Southeastern Division held that § 702 of the APA did not grant jurisdiction, but: "It does provide, that sovereign immunity will not be a defense in an action against the United States if jurisdiction otherwise exists." *Murray v. United States*, 585 F.Supp 543, 544 (D.C. N.D. So.Div. 1984).

> "In considering whether the government has consented to being sued, it should be noted that 28 U.S.C. § 1331 is not a general waiver of immunity. See *Murray v. United States*, 686 F.2d at 1325; *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972). However, as numerous courts have held, the 1976 amendment to § 702 of the Administrative Procedure Act does constitute such a waiver. See e.g. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 725 (2nd Cir. 1983); *Food Town Stores, Inc. v. E.E.O.C.*, 708 F.2d 920; *Warin v. Director, Department of Treasury*, 672 F.2d 590, 591-92 (6th Cir. 1982)(per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980) *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982); *Jaffee v. United*

> *States*, 592 F.2d 712, 718-19 (3rd Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979)."
>
> *Murray*, *supra*.

In *Crowther v. Seaborg*, 312 F.Supp. 1205, 1219 (D.C. Colo. 1970) the Court held that sovereign immunity was not a bar if the suit alleges that the actions of the officer are beyond their statutory authority or it alleges that the powers exercised or the manner in which the powers were exercised are constitutionally void. The Petitioner made these necessary allegations in his Petition.

The Trial Court did not hold that the APA does not apply to the instant action only that the APA is not an independent basis of jurisdiction. The APA serves as a waiver of sovereign immunity for injunctive and declaratory relief, for review of an agency's discretionary decisions to the extent of determining if the decision was arbitrary or capricious or not supported by substantial evidence. See *Trammel v. Callaway*, 415 F.Supp 212, 215,(D.C. N.D. Miss, 1976) and cases cited therein; *Lopez v. Heckler*, 725 F.2d 1489, 1510 (9th Cir. 1984); *Califano v. Sanders*, 430 U.S. 99, 104-108 (1977).

In *Warin*, *supra*, the Sixth Circuit Court said:

> "Francis Warin now appeals the District Court's grant of the government's motion to dismiss his claims because of sovereign immunity. We find that the amended 5 U.S.C. § 702 operates as a waiver of the sovereign immunity defense available under Section § 1331. We, therefore, reverse. We align ourselves with the Circuits that have concluded that 5 U.S.C. § 702 waives the sovereign immunity defense in an action for non-monetary relief under Section § 1331. (Citations Omitted.)
>
> * * *
>
> The legislative history of the bill which amended 5 U.S.C. § 702 and 28 U.S.C. § 1331 is unambiguous:
>
> > The purpose of this bill is best summarized by stating that it would remove three technical barriers to the consideration on the merits of citizens' complaints against the Federal Government, its agencies or employees. The amend-

> ment made to section § 702 of title 5 would eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief on other than money damages and stating a claim based on the assertion or unlawful official action by an agency or by an officer or employee of the agency....
>
> * * *
>
> Another problem which may arise in actions for judicial review of administrative action is that the right asserted can not be valued in dollars and cents. Section 2 of the bill meets this problem by amending section 1331(a) of title 28 by adding an exception to the requirement that there be at least $10,000 in controversy, so that when the action is brought against the United States, any agency thereof,or any officer or employee thereof in his official capacity, the establishment of any such sum or value would not be required.

H.R.No.94-1656, 94th Cong. 2d. Sess., reprinted in [1976] U.S. Code Cong. & Ad. News, 6121, 6123-24.

Our analysis would end here were it not for the District Court's reliance on a recent case from the Second Circuit, *Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978), which held that the defense of sovereign immunity under Section § 1331 is not waived by the recent amendments to the APA. That Court's view seems in conflict with the clear intent of the amendment, and is based on the faulty assumption that Section 1331 incorporates a tacit bar to all suits where the United States is a defendant, unless abrogated by an amendment to Section § 1331 itself. We are thus able to endorse the Second Circuit's reasoning in the *Blumenthal* case.

Warin, *supra*, at 592 and 593.

The Respondent's contention below, the regulations under part 601 of 26 CFR are mere internal operating rules and do not have the force and effect of law and the decision to hold an appeals conference or permit a request for technical advice is discretionary is of little help to them. In fact, it is the abuse of this type of discretion which is at issue in this case. This position of the Respondent, is to hold out the carrot on a string, beyond the reach of the horse. (i.e. There are procedures established by regulation, but the Respondents don't have to comply with them if they elect against them.) The facts as shown in the Amended Petition for Judicial Review are that the IRS granted a conference and then accepted the proffered Request for Technical Advice of the Petitioner. Once having engaged the issues and permitted the process to be invoked, the Respondent, after two and one half years, cannot then apply an arbitrary and capricious method of discretion which violates the principals of "due process" and equal protection under the Fifth Amendment. When an agency of the United States Government promulgates procedural rules they are bound by them and the duty of this court is to strike down the actions of the agency when outside the regulations.

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand the courts will strike it down. This doctrine was announced in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct 499, 98 L.Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process. the *Accardi* doctrine was subsequently applied by the Supreme Court in *Service v. Dulles*, 354 U.S. 363, 77 S.Ct 1152, 1 L.Ed.2d 1403 (1959), and *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct 968, 3 L.Ed.2d 1012 (1959), to vacate the discharges of government employees. See also *Yellin v. United States*, 374 U.S. 109, 83 S.Ct 1828, 10 L.Ed.2d 778 (1963). And the *Accardi* doctrine has been

utilized by the courts of appeal *e.g.*, *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 706 (4 Cir) rehearing denied 412 F.2d 137 (4 Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2 Cir. 1968); *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 389-390 (5 Cir 1966); *Sangamon Valley Television Corp. V. United States*, 106 U.S.App.D.C. 30, 269 F.2d 221, 224-225 (1959).

It is of no significance that the procedures or instructions which the IRS has established are more generous than the Constitution requires. In *Service v. Dulles*, *supra*, the Supreme Court vitiated the discharge of a foreign service officer because of the State Department's failure to follow its own procedures. The Court concluded that it made no difference that the State Department had no statutory or constitutional obligation to establish the procedure in question:

> While it is of course true that * * * the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, * * * having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

354 U.S. at 388, 77 S.Ct. at 1165. See also *Vitarelli v. Seaton, supra.*

Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally label a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep. the Supreme Court in *Vitarelli v. Seaton*, *supra*, applied it to the Army's "Weekly Bulletin 42," § 4(c) (Oct. 20, 1967). *Smith v. Resor*, 406 F.2d 141, 143-144 & n.2, 146 (2 Cir. 1969). The district of Columbia Circuit has applied the doctrine to a FCC "rule" which had not been formally promulgated but which the court found had been established by the FCC's "usual practice" of in-

> cluding the rule in its orders. *Sangamon Valley Television Corp. v. United States*, 106 U.S.App.D.C. 30, 69 F.2d 221, 224-225 & nn. 8 & 9 (1959). See also *McKay v. Wahlenmaier*, 226 F.2d 35, 43 (D.C.Cir. 1955) (alternative holding). The same court has also applied the doctrine to FCC "Standards." *American Broadcasting Co., Inc. v. FCC*, 85 U.S.App.D.C. 343, 179 F.2d 437, 442-443 (1949). Finally, in *United States ex rel. Brooks v. Clifford*, 409 F.2d at 706, this court applied the doctrine to a Department of Defense directive."
>
> These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures. As the Second Circuit said in *Hammond v. Lenfest*, 398 F.2d at 715, cited with approval in *United States ex rel. Brooks v. Clifford*, 409 F.2d at 706, departures from an agency's procedures "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." The arbitrary character of such a departure is in no way ameliorated by the fact that the ignored procedures was enunciated as an instruction in a "News Release." The documents purports to establish certain procedures which Special Agents are "required to follow.

United States v. Heffner, 420 F.2d 809, 811-12 (10th Cir. 1970).

Although the decision in *Heffner*, *supra*, related to a criminal case the *Accardi*, doctrine has been applied in civil cases within the Tenth Circuit. See *Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980); *Moore Oil v. Snakard*, 150 F.Supp 250, 261 (W.D. Ok. 1957); *Oil Shale Corporation v. Morton 370 F.Supp 108*, 122 (D.C. Colo. 1973); *Matzke v. Block 542 F.Supp 1107*, 1115 (D.C. Kansas 1982) (discretion vested in administrative agency, refusal to exercise it is itself an abuse of discretion); *Tosco v. Hodel*, 611 F.supp 1130, 1164 (D.C. Colo. 1985). Other Criminal applications see also: *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States v. Bettenhausen*, 499 F.2d 1223, 1230, (10th cir. 1974); *United States v. Lockyer*, 448 F.2d 417 (10th Cir. 1971). There

can be no doubt that when an agency resorts to the procedures it has in place it is thereby bound to the procedures just as is the citizen. *Warner v. Westover*, 70 F.Supp 111 (S.D. Cal 1947).

> "* * * Conceding that regulations are entitled to weight, which, at times, gives them the force of law, they are as binding on the Government as they are on the taxpayer. *See Mertens, The Law of Federal Income Taxation*, 1942, Sec. 3.20. As said by Judge Mathews in *Pacific National Bank of Seattle v. Commissioner of Internal Revenue*, 9 Cir., 1937, 91 F.2d 103, [104,] 105: 'The suggestion that Treasury Regulation having the force and effect of law are binding on taxpayers, but not on the Commissioner or on the Board of Tax Appeals, cannot be entertained. Tax officials and taxpayers alike are under the law, not above it.'"
> *Warner, supra*, at 115.

The District Court in *Tax Analysts and Advocates v. Shultz*, 376 F.Supp 889 (D.C. Col. 1974) had no problem with the determination that once IRS employees acts are declared to by outside the scope of their authority that the APA is available to have the actions reviewed. *Tax Analysts and Advocates v. Shultz, Supra*, 895. 26 U.S.C. § 7805 authorizes the secretary to issue rules and regulations and issue rulings amplifying technical provisions of the statutes. It is this power to make regulations and the compliance with their mandates which creates the nexus to 5 U.S.C. § 702 to provide for the review of the abuse of the agencies discretion and for review of acts taken outside the official authority. The neglect to publish the field organization and structure and final delegations of authority leaves both the Petitioner, his counsel, and this court without any way to determine if the officials who acted arbitrarily and capriciously in denying the Petitioner's Request for Technical Advice were within their authority. Clearly, the regulations do not permit a delay of two and one half years, nor a refusal to submit the technical advice without notice of the appeal procedures being given to the Petitioner. According to Revenue Procedure 90-2, Cum.Bull. 1990-1:

> **Section 3. Requesting Technical Advice**
> .04 If the taxpayer initiates the action to request technical advice and the taxpayer's statement of

> the facts and points at issue are not wholly acceptable to the District or Appeals Office, the Service will tell the taxpayer in writing what the areas of disagreement are.
>
> * * *
>
> .06 At the time the taxpayer is told that the matter is being referred to the National Office, the taxpayer will also be told about the right to a conference in the National Office if an adverse decision is indicated and will be asked to say whether such a conference is desired.

Section 4. Appeal by Taxpayer of District or Appeals Office Determination Not to Seek Technical Advice

> .01 If the examining officer or Ap[peals Officer thinks that a taxpayer's request for referral of an issue to the National Office for technical advice does not warrant referral, the examining officer or Appeals Officer will tell the taxpayer.

Under 26 CFR 601.105(b)(5)(iii)(a) a taxpayer may request an issue be referred to the National Office. § 601.105(b)(5)(iii)(d) indicates that if the statement of facts or points of authority are not wholly acceptable to the district officials the taxpayer will be advised in writing as to the areas of disagreement. The Petitioner was never notified of any problem, although the Petitioner's counsel attempted to find out the status of the Technical Advice request there was never any indication there were problems with the facts or authorities. Under §601.105(b)(5)(iv)(a):

> "If the taxpayer has requested referral of an issue before a district office to the National Office for technical advice, and after consideration of the request the examiner is of the opinion that the circumstances do not warrant such referral, he will so advise the taxpayer."
>
> "(b) The taxpayer may appeal the decision of the examining officer not to request a technical advice..."

In the Internal Revenue Manual for Administration at § (11)724.1(1) "Field Procedure" the examining officer is to tell the taxpayer when the request will not be submitted. When Clay Carpenter wrote the Petitioner herein he had the obliga-

tion to tell the Petitioner the Technical Advice would not be sent and what the appeal rights and procedures were. Under the Taxpayer Bill of Rights PL 100-647 § 6227(a)(2) the Secretary of the Treasury was to create, not later than 180 days following the passage of the bill, a statement of the "procedure by which a taxpayer may appeal any adverse decision of the Service (including administrative and judicial appeals)". Under this law the Petitioner was entitled to notice of the appeal procedures.

The Petitioner was not notified he had the right to seek an appeal of the decision of the examining officer. If the conduct of the agency with respect to part 601 of the Code of Federal Regulations of Title 26 is not reviewable under the circumstances of this case, then what is the point of having the agency create rules of procedure for the conduct of its employees and agents? Because it creates the illusion of due process?

The Petitioner was careful to try to draft a Petition which avoided the jurisdictional bars contained in 26 U.S.C. § 7421 and 28 U.S.C. § 2201. This case is not about taxes, it is about procedure. The Petitioner was given the opportunity to participate in the administrative process available and to submit a Request for Technical Advice for tax years which were under investigation. The Petitioner accepted the offer, while the Request was in submission, the agency issued a notice of deficiency and initiated investigation of additional tax years. The Petitioner had the additional tax years incorporated into the Request for Technical Advice. But, two and one half years later the agency, (without submitting the Request to the National Office as agreed) through a field officer declared the Request frivolous. The Petitioner contends that the individual who declared the Request for Technical Advice frivolous was with the proper delegation of authority to make such a determination and did so in an arbitrary and capricious manner and without notice to the Petitioner of his appeal rights.

Each of the cases cited by the Respondents with respect to the discretion of the agency related to reviews of whether or not the agency was required to provide the procedures under 26 CFR part 601 when the procedure was not offered to the taxpayer. In each case, the IRS had not opened the door to engage in the procedure,[11] these cases represent the opposite

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[11] *Rosenberg v. Commissioner*, 450 F.2d 529, 532-533 (10th Cir. 1971); *Luhring v. Glotzbach*, 304 F.2d 560, 562-565 (4th Cir. 1962); *Wilcox v. Commissioner*,

of what occurred in this case. Here the IRS agreed to permit the Petitioner to seek the Request for Technical Advice. The Petitioner contends (unlike the individuals who sought to compel the procedures of part 601 after the fact, thereby attempting to restrain the assessment or collection of a tax) that once the agency engaged in the procedures in 26 CFR 601.105 they then became mandatory on the agency. This is an important distinction!

It just seems unreasonable that the agency can invoke a process and entice an individual into using the procedure and then arbitrarily and without notice determine that it no longer wishes to comply with the procedural rules it set out.

As to the issue of delegations of authority and field organization and structure being published the government points to *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) as the end all final answer on the publication of field organization and structure. However, in the cases cited at page 1446 appeared to turn on the lack of ability to show how the individuals were adversely affected by the failure to publish. Here the Petitioner was adversely affected because the lack of publication and notice from the agency as to who or what title should be contacted with respect to the transmission of his Technical Advice was absent and effectively prohibiting him from being able to follow up on the submission of the request through the administrative channels and to know who to complain to in the process.

> "Hatcher's reliance on this section [5 U.S.C. § 552(a)]ignores the exception for actual and timely notice. 'The purpose of publication in the Federal Register is public guidance.' *Pitts v. United States*, 599 F.2d 1103, 1108 (1st Cir. 1979). Actual and timely notice under 5 U.S.C. § 552 should be interpreted to mean that the agency must be precise, timely, and informative with respect to procedures. *United States v. Anaconda Company*, 445 F.Supp 486, 497 (D.C. 1977)."

Footnote 11, continued.

848 F.2d 1007 (9th Cir. 1988); *Boulez v. Commissioner*, 810 F.2d 209, 215 (D.C. Dir. 1987), *cert. denied*, 484 U.S. 896 (1987); *Estate of Jones v. Commissioner*, 795 F.2d 566, 571 (6th Cir. 1986); *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983); *Einhorn v. Dewitt* 618 F.2d 347, 350 (5th Cir. 1980); *Ward v. Commissioner*, 784 F.2d 1424, 1431 (9th Cir. 1986).

Hatcher v. United States, 733 F.Supp 218 (M.D. Pa. 1990).

The Petitioner is not making challenges to summons as were the individuals in *Murdock v. United States*, 1990 WL 120664, 1990 U.S. Dist. LEXIS 9269 (D.Utah 1990); *United States v. National Commodity and Barter Assoc.*, 1990 WL 85905, 1990 U.S.Dist. LEXIS 5177 (D. Colo. 1990); *Van Sant v.United States*, 1990 WL 21279, 1990 U.S.Dist. LEXIS 2843 (D.Colo. 1990); *Reimer v. United States*, 1990 WL 85686, 1990 U.S.Dist. LEXIS 1167 (D.Haw. 1990). The Petitioner challenges the failure to publish as an individual actually adversely affected. If he is or is not adversely affected it is not a question before this court for review, as the complaint was dismissed before any fact finding and the Petitioner is entitled to have all reasonable inferences drawn in his favor due to the Rule 12(b) dismissal in the trial court below.

The Respondent has ***not*** asserted that: (1) the IRS employees in this action had the authority to refuse to follow the regulations and procedures set forth in 26 CFR 601.105, to delay the forwarding of the Petitioner's Request for Technical Advice to the National Office for over two and one half years; or (2) the criminal investigation division had the authority to deny the Petitioner's Request for Technical Advice.

Regardless of the issue of ultra vires conduct (If the conduct of the Respondents was ultra vires their decisions with respect to non-submission of the Request for Technical Advice and its denial without notice of procedures would be arbitrary and capricious.) the conduct of the Respondents was arbitrary and capricious and if the governments arguments are to be affirmed then the conduct of the Respondents will continually evade or circumvent judicial review.

The Respondent also contended below that they were exempt from the operation of the APA citing *Rosenberg v. Commissioner*, 450 F.2d 529, 532-533 (10th Cir. 1971); *Luhring v. Glotzbach*, 304 F.2d 560, 562-565 (4th Cir. 1962); *Wilcox v. Commissioner*, 848 F.2d 1007 (9th Cir. 1988); *Boulez v. Commissioner*, 810 F.2d 209, 215 (D.C. Dir. 1987), *cert. denied*, 484 U.S. 896 (1987); *Estate of Jones v. Commissioner*, 795 F.2d 566, 571 (6th Cir. 1986); *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983); *Einhorn v. Dewitt* 618 F.2d 347, 350 (5th Cir. 1980); *Ward v. Commissioner*, 784 F.2d 1424, 1431 (9th Cir. 1986).

The Petitioner has adduced the following cases for the proposition that the APA does permit review of the conduct complained of in his Petition. See: *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 725 (2nd. Cir. 1983); *Food Town Stores, Inc. v. E.E.O.C.*, 708 F.2d 920 (4th Cir. 1983); *Warin v. Director, Department of Treasury*, 672 F.2d 590, 591-92 (6th Cir. 1982)(per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980) *cert. denied.* 452 U.S. 905 (1981); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3rd. Cir. 1979), *cert. denied* 441 U.S. 961 (1979); *Burgos v. Milton*, 709 F.2d 1 (1st. Cir. 1983); *Murray v. United States*, 585 F.Supp 543 (D.C. N.D. So.Div. 1984).

Consequently, the Petitioner concludes a split within the circuits with respect to the issue of judicial review of administrative actions of the IRS. On this additional basis he requests this Court grant his Petition for Certiorari and determine that the IRS is subject to the Administrative Procedures Act when they fail to follow their own regulations.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

ROBERT J. FOSTVEDT
P.O. Box 7412
Colorado Springs, Colorado 80933
(719) 597-9402

In his proper person.

BEST AVAILAB

Judgment in accordance with the opinion of the court in 91-1334, Fostvedt v. USA (Lower docket: 91-C-488) was entered on November 3, 1992.

APPENDIX A-1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 91-1334

ROBERT J. FOSTVEDT

Petitioner,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE OF THE UNITED STATES; NICHOLAS F. BRADY, Secretary of the Treasury; FRED GOLDBERG, JR., Commissioner of the Internal Revenue Service; G.F. SWANSON, IRS District Director; BETTY L. MOSES, IRS Special Agent; DAVID ROMERO, IRS Agent; KIM SAVAGE, IRS Agent; SUSIE SUTTER, IRS Group Manager; BETSY SALAS, IRS Agent; CLAY CARPENTER, IRS Special Agent; and other respondents not known,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 91-C-488)

Submitted on the briefs:

Robert J. Fostvedt, pro se.

James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, Ann B. Durney, and Mary Frances Clark, Tax Division, Department of Justice, Washington, D.C. (Michael J. Norton, United States Attorney, Denver, Colorado, of Counsel) for Respondents-Appellees.

Before McKAY, Chief Judge, and BARRETT, Circuit Judge, and BRIMMER, ** District Judge.

**Honorable Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation.

McKAY, Chief Judge.

Petitioner Robert J. Fostvedt commenced this suit seeking judicial review of certain actions and decisions of the Internal Revenue Service and its agents with respect to the agency's pre-assessment procedures for his unpaid income taxes for the years 1982, 1984, and 1985. Petitioner alleges that Respondents violated his constitutional rights by (1) failing to timely respond to his request for technical advice, (2) denying him an appeals conference, (3) failing to publish its field organization and final delegations of authority in the Federal Register and (4) keeping records classifying him an "illegal tax protester" in violation of the Privacy Act.

In his petition for review, Petitioner seeks to have the Court compel the IRS to submit his request for technical advice, abate the notice of deficiency, and hold an appeal conference. In addition, he asks that the court declare the actions of the agency to be arbitrary, capricious, an abuse of discretion and unconstitutional, and enjoin the agency from further action against Petitioner until it has complied with his requests.

Respondents moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, or in the

alternative, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted Respondents' motion and dismissed Petitioner's action for lack of subject matter jurisdiction. We review the question of a district court's subject matter jurisdiction de novo, *Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991), and we affirm.[1]

I. Jurisdiction

The United States may not be sued without its consent. *United States v. Dalm*, 494 U.S. 596, 608 (1990). Such a waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). "It long has been established, . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sehrwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity cannot be implied, but must be explicitly expressed. *United States v. King*, 395 U.S. 1, 4 (1969).

Petitioner asserts that the court has subject matter jurisdiction pursuant to 18 U.S.C. §§ 1331 (federal question jurisdiction), 1340 (jurisdiction over actions arising under the Internal Revenue Code), and 1361 (jurisdiction of actions in the nature of mandamus). *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990). These are statutes conferring general jurisdictional and "[s]overeign immunity is not waived by general jurisdictional statutes." *Id.* [2]

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Subject matter jurisdiction over internal revenue actions is provided by 28 U.S.C. § 1340. However, this grant does not constitute a waiver of sovereign immunity. *Guthrie v. Sawyer*, 970 F2d 733, 735 (10th Cir. 1992).

The burden is on the taxpayer to find and prove an "explicit waiver of sovereign immunity." *Lonsdale*, 919 F.2d at 1444. Petitioner contends that the right of judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 702, when coupled with a grant of general jurisdiction, creates a waiver of sovereign immunity in this case. We do not agree. First, the APA does not create an independent grant of jurisdiction for the review of agency actions. *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990). Second, § 702 clearly disclaims any effect on existing limitations on the court's power to grant relief.

Section 702 reads in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therin be denied on the ground that it is against the United States or that the United States an indispensable party. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Although disguised as a procedural challenge, the essence of Petitioner's action is an attempt to delay and/or prevent the IRS from assessing and collecting the income tax deficiencies and penalties due because of Petitioner's failure to file income tax returns for the years in question. *James v. United States*, 970 F.2d 750, 753-54 (10th Cir. 1992).[3]

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[3] We note that in Petitioner's complaint, he claims to have

Actions in the nature of Petitioner's suit are prohibited by the Anti-Injunction Act. 26 U.S.C. § 7421(a), and the tax exception provision of the Declaratory Judgment Act, 28 U.S.C. § 2201. Section 7421(a) provides that no suit to restrain the assessment or collection of any tax shall be maintained. In addition, the Declaratory Judgment Act specifically prohibits declaratory judgments in matters relating to federal taxes. *See* 28 U.S.C. § 2201; *Flora v. United States*, 362 U.S. 145, 164 (1960).[4]

Contrary to petitioner's assertions, § 702 of the APA does not override the limitations of the Anti-Injunction Act and the Declaratory Judgment Act. *See McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991). It is clear that the Anti-Injunction Act and the Declaratory Judgment Act are part of a specific statutory framework intended by Congress as limitations not negated by the APA. *See Lonsdale*, 919 F.2d at 1444 (§ 702 does not provide authority to grant relief where other statutes forbid the relief sought). The legislative history of the 1976 amendment to § 702 specifically states that the revision is to have no affect on the limitations and prohibitions of the Anti-Injunction and Declaratory Judgment Acts. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6132-33. Therefore, because we agree that Petitioner has

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Footnote 3 continued.
no ties whatsoever, with the United States. R. Vol. I, doc. 20 at 2-3. He claims that he is a "Citizen of the State of Texas," and that the hospital he was born in is located on land which was never deeded to the United States. *Id.* at 2.

[4] There are statutory and judicial exception to the prohibition of both statutes. *See, e.g.*, 26 U.S.C. § § 6212(c)(1) and 6213(a); 26 U.S.C. § 7428; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). However, Petitioner has failed to bring himself within any of the exceptions, and thus, none are applicable here. The district court must dismiss, for lack of subject matter jurisdiction, any suit that does not fall within one of the exceptions. *Alexander v. "Americans United." Inc.*, 416 U.S. 752, 757-58 (1974).

failed to find and prove an explicit waiver of sovereign immunity in this case, we conclude that the district court was correct in dismissing Petitioner's action for lack of subject matter jurisdiction. [5]

II. Sanctions

Respondents have requested sanctions be imposed on Petitioner for a frivolous appeal pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38. *See Casper v. Commissioner*, 805 F.2d 902, 906 (10th Cir. 1986). Petitioner has had an opportunity to respond in his reply brief. *See Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987). Although Petitioner has a history of appeals in this court in which he has raised tax collection issues, we decline to impose sanctions in this case. However, in the event Petitioner should attempt to raise these same issues again sanctions may be considered proper.

The Judgment of the United States District Court for the District of Colorado is AFFIRMED.

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[5] Because we agree that the district court lacked subject matter jurisdiction, we do not reach the merits of Petitioner's additional claims.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE No. 91-C-488

ROBERT J. FOSTVEDT,
Plaintiff,
vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER

CARRIGAN, J.

Petitioner, Robert J. Fostvedt, commenced this action alleging that the Internal Revenue Service (IRS) violated his constitutional rights by denying him an appeals conference, denying his request for technical assistance, and failing to publish its field organization and final delegations of authority in the Federal Register. Respondents are the IRS and nine federal employees, each named in his or her official capacity. On June 25, 1991, the respondents moved to dismiss. Petitioner initially was ordered to respond to the motions no later than July 10, 1991, but he requested and was granted an extension until July 29, 1991. Rather than responding, the petitioner apparently tried to overcome the defects highlighted by the respondents' motions by filing an amended petition.

Respondents assert that his court lacks subject matter jurisdiction. A suit against a federal agency is deemed to be a suit against the United States "if judgment would expend itself on the public treasury or domain . . . ." *Dugan et al. v. Rank et al.*, 372 U.S. 609, 620. In addition, an action against a government official in his or her official capacity is a suit against the United States. *Id.* at 620. Therefore, this action must be

construed as a suit against the United States.

As sovereign, the United States is immune from suit unless it expressly has consented to be sued. The terms of its consent to be sued define the court's jurisdiction to entertain the action. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Ascot Dinner Theatre Ltd. v. Small Business Administration*, 887 F.2d 1024, 1027 (10th Cir. 1989). It follows that the petitioner is barred except to the extent that the United States may have waived sovereign immunity.

Waiver of sovereign immunity can not be implied, but must be unequivocally expressed. *Testan*, 424 U.S. at 399; *Ascot*, 887 F.2d at 1027. In his amended petition, the petitioner asserts that the United States has waived sovereign immunity pursuant to 5 U.S.C. §§ 551(13), 552a(e), 701, 702, 703, 704, 705 and 706 (the Administrative Procedure Act) and 26 U.S.C. § 7805. Absent a clear waiver of sovereign immunity in one of the statutes relied on to support jurisdiction, the petition must be denied.

In *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990), the Tenth Circuit stated that "[t]he Administrative procedure Act itself is not a grant of jurisdiction for the review of agency actions." Thus, none of the act's provisions relied upon by the petitioner waives sovereign immunity. *Id.*

Section 7805 of Title 26 does not deal with either federal court jurisdiction or sovereign immunity. It is difficult to understand how the petitioner could argue that that section could be construed as an explicit waiver of sovereign immunity. I conclude that it is not such a waiver.

Because the United States has not waived its sovereign immunity, the Petition must be dismissed.

Accordingly IT IS ORDERED that the respondents' motions to dismiss are granted and the petition is dismissed for each of lack of subject matter jurisdiction.

Dated at Denver, Colorado July 30, 1991.

BY THE COURT:

/S/

JIM R. CARRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX C-1

26 CODE OF FEDERAL REGULATIONS § 601.105(b)(5)

(5) *Technical advice from the National Office - (i) Definition and nature of technical advice. (a)* As used in this subparagraph, "technical advice" means advice or guidance as to the interpretation and proper application of internal revenue laws, related statutes, and regulations, to a specific set of facts, furnished by the National Office upon request of a district office in connection with the examination of a taxpayer's return or consideration of a taxpayer's return claim for refund or credit. It is furnished as a means of assisting Service personnel in closing cases and establishing and maintaining consistent holdings in the several districts. It does not include memorandums on matters of general technical application furnished to district offices where the issues are not raised in connection with the examination of a return of a specific taxpayer.

(b) The consideration or examination of the facts relating to a request for a determination letter is considered to be in connection with the examination or consideration of a return of the taxpayer. Thus, a district director may, in his discretion, request technical advice with respect to the consideration of a request for a determination letter.

(c) If a district director is of the opinion that a ruling letter previously issued to a taxpayer should be modified or revoked, and requests the National Office to reconsider the ruling, the reference of the matter to the National Office is treated as a request for technical advice and the procedures specified in subdivision *(iii)* of this subparagraph should be followed in order that the National Office may consider the district director's recommendation. Only the National Office can revoke a ruling letter. Before referral to the National Office, the district director should inform the taxpayer of his opinion that the ruling letter should be revoked. The district director, after development of the facts and consideration of the taxpayer's arguments, will decide whether to recommend revocation of the ruling to the National Office. For procedures related to a request for a ruling, see § 601.201.

(d) The Assistant Commissioner (Technical), acting under a delegation of authority from the Commissioner of Internal

Revenue, is exclusively responsible for providing technical advice in any issue involving the establishment of basic principles and rules for the uniform interpretation and application of tax laws other than those which are under the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms. This authority has been largely redelegated to subordinate officials.

(e) The provisions of this subparagraph apply only to a case under the jurisdiction of a district director but do not apply to an Employee Plans case under the jurisdiction of a key district director as provided in § 601.201(o) or to an Exempt Organization case under the jurisdiction of a key district director as provided in § 601.201(n). The technical advice provisions applicable to Employee Plans and Exempt Organization cases are set forth in § 601.201(n)(9). The provisions of this subparagraph do not apply to a case under the jurisdiction of the Bureau of Alcohol, tobacco, and Fire arms. They also do not apply to a case under the jurisdiction of an Appeals office, including a case previously considered by Appeals. The technical advice provisions applicable to a case under the jurisdiction of an Appeal office, other than Employee Plans and Exempt Organizations cases, are set forth in § 601.106(f)(10). A case remains under the jurisdiction of the district director even though an Appeals office has the identical issue under consideration in the case of another taxpayer (not related within the meaning of section 267 of the Code) in an entirely different transaction. Technical advice may not be requested with respect to a taxable period if a prior Appeals disposition of the same taxable period of the same taxpayer's case based on mutual concessions (ordinarily with a Form 870-AD, Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment). However, technical advice may be requested by a district director on issues previously considered in a prior Appeals disposition, not based on mutual consessions, of the same taxable periods of the same taxpayer with the concurrance of the Appeals office that had the case.

(ii) Areas in which technical advice may be requested. *(a)* District directors may request technical advice on any technical or procedural question that develops during the audit or examination of a return, or claim for refund or credit, of a tax-

payer. These procedures are applicable as provided in subdivision *(i)* of this subparagraph.

(b) District directors are encouraged to request technical advice on any technical or procedural question arising in connection with any case of the type described in subdivision *(i)* of this subparagraph, which cannot be resolved on the basis of law, regulations or a clearly applicable revenue ruling or other precedent issued by the National Office. This request should be made at the earliest possible state of the examination process.

(iii) requesting technical advice. (a) It is the responsibility of the district office to determine whether technical advice is to be requested on any issue before that office. However, while the case is under the jurisdiction of the district director, a taxpayer or his/her representative may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. This request should be made at the earliest possible state of the examination process. While taxpayers are encouraged to make written requests setting forth the facts, law, and argument with respect to the issue, and reason for requesting National Office advice, a taxpayer may make the request orally. If, after considering the taxpayers request, the examiner is of the opinion that the circumstances do not warrant referral of the case to the National Office, he/she will so advise the taxpayer. (See subdivision *(iv)* of this subparagraph for taxpayer's appeal rights where the examiner declines to request technical advice.)

(b) When technical advice is to be requested, whether or not upon the request of the taxpayer, the taxpayer will be so advised, except as noted in *(g)* of this subdivision. If the examiner initiates the action, the taxpayer will be furnished a copy of the statement of the pertinent facts and the question or questions proposed for submission to the National Office. The request for advice submitted by the district director should be so worded as to avoid possible misunderstanding, in the National Office, of the facts or of the specific point or points at issue.

(c) After receipt of the statement of facts and specific

questions from the district office, the taxpayer will be given 10 calendar days in which to indicate in writing the extent, if any, to which he may not be in complete agreement. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division. Every effort should be made to reach agreement as to the facts and specific point at issue. If agreement cannot be reached, the taxpayer may submit, within 10 calendar days after receipt of notice from the district office, a statement of his understanding as to the specific point or points at issue which will be forwarded to the National Office with the request for advice. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division.

(d) If the taxpayer initiates the action to request advice, and his statement of the facts and point or points at issue are not wholly acceptable to the district officials, the taxpayer will be advised in writing as to the areas of disagreement. The taxpayer will be given 10 calendar days after receipt of the written notice to reply to the district official's letter. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division. If agreement cannot be reached, both the statements of the taxpayer and the district official will be forwarded to the National Office.

(e)(1) In the case of requests for technical advice the taxpayer must also submit, within the 10-day period referred to in *(c)* and *(d)* of this subdivision, whichever applicable (relating to agreement by the taxpayer with the statement of facts submitted in connection with the request for technical advice), the statement described in *(f)* of this subdivision of proposed deletions pursuant to section 6110(c) of the Code. If the statement is not submitted, the taxpayer will be informed by the district director that such a statement is required. If the district director does not receive the statement within 10 days after the taxpayer has been informed of the need for such statement, the district director may decline to submit the request for technical advice. If the district director decides to request technical advice in a case where the taxpayer has not submitted that statement of proposed deletions, the National Office will make those deletions which in the judgment of the Commissioner are re-

quired by section 6110(c) of the Code.

(2) The requirements included in § *601.105(b)(5)* with respect to submissions of statements and other material with respect to proposed deletions to be made from technical advice memoranda before public inspection is permitted to take place do not apply to requests made by the district director before November 1, 1976, or request for any document to which section 6104 of the Code applies.

(f) In order to assist the Internal Revenue Service in making the deletions, required by section 6110(c) of the Code, from the text of technical advice memoranda which are open to public inspection pursuant to section 6110(a) of the Code, there must accompany requests for such technical advice either a statement of the deletions proposed by the taxpayer and the statutory basis for each proposed deletion, or a statement that no information other than names, addresses and taxpayer identifying number need be deleted. Such statements shall be made in a separate document. The statement of proposed deletions shall be accompanied by a copy of all statements which are submitted to the National Office pursuant to *(c)* or *(d)* of this subdivision, on which shall be indicated, by the use of brackets, the material which the taxpayer indicated should be deleted pursuant to section 6110(c) of the Code. The statement of proposed deletions shall indicate the statutory basis, under section 6110(c) of the Code, for each proposed deletion. The statement of proposed deletions shall not appear or be referred to anywhere in the request for technical advice. If the taxpayer decides to request additional deletions pursuant to section 6110(c) of the Code prior to the time the National Office replies to the request for technical advice, additional statements may be submitted.

(g) If the taxpayer has not already done so, the taxpayer may submit a statement explaining the taxpayer's position on the issues, citing precedents which the taxpayer believes will bear on the case. This statement will be forwarded to the National Office with the request for advice. If it is received at a later date, it will be forwarded for association with the case file.

(h) At the time the taxpayer is informed that the matter is being referred to the National Office, the taxpayer will also

be informed of the taxpayer's right to a conference in the National Office in the event an adverse decision is indicated, and will be asked to indicate whether such a conference is desired.

(i) Generally, prior to replying to the request for technical advice the National Office shall inform the taxpayer orally or in writing of the material likely to appear in the technical advice memorandum which the taxpayer proposed be deleted but which the Internal Revenue Service determined should not be deleted. If so informed the taxpayer may submit within 10 days any further information, arguments or other material in support of the position that such material be deleted. The Internal Revenue Service will attempt, if feasible, to resolve all disagreements with respect to proposed deletions prior to the time the National Office replies to the request for technical advice. However, in no event shall the taxpayer have the right to a conference with respect to resolution of any disagreements concerning material to be deleted from the text of the technical advice memorandum, but such matters may be considered at any conference otherwise scheduled with respect to the request.

(j) The provisions of *(a)* through *(i)* of this subdivision, relating to the referral of issues upon request of the taxpayer, advising taxpayers of the referral of issues, the submission of proposed deletions, and the granting of conferences in the National Office, are not applicable to technical advice memoranda described in section 611(g)(5)(A) of the Code, relating to cases involving criminal or civil fraud investigation and jeopardy or termination assessments. However, in such cases the taxpayer shall be allowed to provide the statement of proposed deletions to the National Office upon completion of all proceedings with respect to the investigations or assessments, but prior to the date on which the Commissioner mails the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum.

(k) Form 4463, Request for Technical Advice, should be used for transmitting requests for technical advice to the National Office.

(iv) Appeal by taxpayers of determination not to seek technical advice. (a) If the taxpayer has requested referral of an issue before a district office to the National Office for tech-

nical advice, and after consideration of the request the examiner is of the opinion that the circumstances do not warrant such referral, he will so advise the taxpayer.

(b) The taxpayer may appeal the decision of the examining officer not to request technical advice by submitting to that official, within 10 calendar days after being advised of the decision, a statement of the facts, law, and arguments with respect to the issue, and the reasons why he believes the matter should be referred to the National Office for advice. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division.

(c) The examining officer will submit the statement of the taxpayer through channels to the Chief, Examination Division, accompanied by a statement of his reasons why the issue should not be referred to the National Office. The Chief, Examination Division, will determine, on the basis of the statements submitted, whether technical advice will be requested. If he determines that technical advice is not warranted, he will inform the taxpayer in writing that he proposes to deny the request. In the letter to the taxpayer the Chief, Examination Division, will (except in unusual situations where such action would be prejudicial to the best interests of the Government) state specifically the reasons for the proposed denial. The taxpayer will be given 15 calendar days after receipt of the letter in which to notify the Chief, Examination Division, whether he agrees with the proposed denial. The taxpayer may not appeal the decision of the Chief, Examination Division, not to request technical advice from the National Office. However, if he does not agree with the proposed denial all data relating to the issue for which technical advice has been sought, including taxpayer's written request and statements, will be submitted to the National Office, Attention: Director, Examination Division, for review. After review in the National Office, the district office will be notified whether the proposed denial is approved or disapproved.

(d) While the matter is being reviewed in the National Office, the district office will suspend action on the issue (except where the delay would prejudice the Government's interest) until it is notified of the National Office decision. This notification will be made 30 days after receipt of the data in the

National Office. The review will be solely on the basis of the written record and no conference will be held in the National Office.

(v) Conference in the National Office. (a) If, after a study of the technical advice request, it appears that advice adverse to the taxpayer should be given and a conference has been requested, the taxpayer will be notified of the time and place of the conference. If conferences are being arranged with respect to more than one request for advice involving the same taxpayer, they will be so scheduled as to cause the least inconvenience to the taxpayer. The conference will be arranged by telephone, if possible, and must be held within 21 calendar days after contact has been made. Extensions of time will be granted only if justified in writing by the taxpayer and approved by the appropriate Technical branch chief.

(b) A taxpayer is entitled, as a matter of right to only one conference in the National Office unless one of the circumstances discussed in *(c)* of this subdivision exists. This conference will usually be held at the branch level in the appropriate division (Corporation Tax Division or Individual Tax division) in the office of the Assistant Commissioner (Technical), and will usually be attended by a person who has authority to act for the branch chief. In appropriate cases the examining officer may also attend the conference to clarify the facts in the case. If more than one subject is discussed at the conference, the discussion constitutes a conference with respect to each subject. At the request of the taxpayer or his representative, the conference may be held at an earlier state in the consideration of the case than the Service would ordinarily designate. A taxpayer has no "right" of appeal from an action of a branch to the director of a division or to any other National Office official.

(c) In the process of review of a holding proposed by a branch, it may appear that the final answer will involve a reversal of the branch proposal with a result less favorable to the taxpayer. Or it may appear that the adverse holding proposed by a branch will be approved, but on a new or different issue or on different grounds than those on which the branch decided the case. Under either of these circumstances, the taxpayer or his representative will be invited to another conference. The

provisions of this subparagraph limiting the number of conferences to which a taxpayer is entitled will not foreclose inviting a taxpayer to attend further conferences when, in the opinion of National Office personnel, such need arises. All additional conferences of this type discussed are held only at the invitation of the Service.

(d) It is the responsibility of the taxpayer to furnish to the National Office, within 21 calendar days after the conference, a written record of the conference, a written record of any additional data, line of reasoning, precedents, etc., that were proposed by the taxpayer and discussed at the conference but were not previously or adequately presented in writing. Extensions of time will be granted only if justified in writing by the taxpayer and approved by the appropriate Technical branch chief. Any additional material and a copy thereof should be addressed to and sent to the National Office which will forward the copy to the appropriate district director. The district director will be requested to give the matter his prompt attention. He may verify the additional facts and data and comment upon it to the extent he deems it appropriate.

(e) A taxpayer or a tax payer's representative desiring to obtain information as to the status of the case may do so by contacting the following offices with respect to matters in the areas of their responsibility:

Official	Telephone numbers, (Area Code 202)
Director Corporation Tax Division	566-4504 or 566-4505
Director Individual Tax Division	566-3767 or 566-3788

(vi) Preparation of technical advice memorandum by the National Office. (a) Immediately upon receipt in the National Office, the technical employee to whom the case is assigned will analyze the file to ascertain whether it meets the requirements of subdivision *(iii)* of this subparagraph. If the case is not complete with respect to any requirement in subdivisions *(iii)(a)* through *(d)* of this subparagraph, appropriate steps will be taken to complete the file. If any request for technical advice does not comply with the requirements of subdivision

(iii)(e) of this subparagraph, relating to the statement of proposed deletions, the National Office will make those deletions from the technical advice memorandum which in the judgment of the Commissioner are required by section 61210(c) of the Code.

(b) If the taxpayer has requested a conference in the National Office the procedures in subdivision *(v)* of this subparagraph will be followed.

(c) Replies to request for technical advice will be addressed to the district director and will be drafted in two parts. Each part will identify the taxpayer by name, address, identification number, and the year or years involved. The first part (hereafter called the "Technical Advice Memorandum") will contain *(1)* a recitation of the pertinent facts having a bearing on the issue; *(2)* a discussion of the facts, precedents, and reasoning of the National Office; and *(3)* the conclusions of the National Office. The conclusions will give direct answers, whenever possible, to the specific questions of the district office. The discussion of the issues will be in such detail that the district officials are appraised of the reasoning underlying the conclusion. There shall accompany the technical advice memorandum a notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum (including a copy of the version proposed to be open to public inspection and notations of third party communications pursuant to section 6110(d) of the Code) which the district director shall forward to the taxpayer at such time that the district director furnishes a copy of the technical advice memorandum to the taxpayer pursuant to *(e)* of the subsection.

(d) The second part of the reply will consist of a transmittal memorandum. In the unusual cases it will serve as a vehicle for providing the district office administrative information or other information which, under the nondisclosure statutes, or for other reasons, may not be discussed with the taxpayer.

(e) It is the general practice of the Service to furnish a copy of the technical advice memorandum to the taxpayer after it has been adopted by the district director. However, in the case of a technical advice memoranda described in section 6119(g)(5)(A) of the Code, relating to cases involving criminal or civil fraud investigations and jeopardy or termination assess-

ments, a copy of the technical advice memorandum shall not be furnished the taxpayer until all proceedings with respect to the investigations or assessments are completed.

(f) After receiving the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum, if the taxpayer desires to protest the disclosure of certain information in the technical advice memorandum, the taxpayer must within 20 days after the notice is mailed submit a written statement identifying those deletions not made by the Internal Revenue Service which the taxpayer believes should have been made. The taxpayer shall also submit a copy of the version of the technical advice memorandum proposed to be open to public inspection on which the taxpayer indicates, by the use of brackets, the deletions proposed by the taxpayer but which have not been made by the Internal Revenue Service. Generally the Internal Revenue Service will not consider the deletion under this subparagraph of any material which the taxpayer did not, prior to the time when the National Office sent its reply to the request for technical advice to the district director, propose be deleted. The Internal Revenue Service shall, within 20 days after receipt of the response by the taxpayer to the notice pursuant to section 6110(f)(1) of the Code, mail to the taxpayer its final administrative conclusion with respect to the deletions to be made.

(vii) Action on technical advice in district offices. (a) Unless the district director feels that the conclusions reached by the National Office in a technical advice memorandum should be reconsidered and promptly requests such reconsideration, his office will proceed to process the taxpayer's case on the basis of the conclusions expressed in the technical advice memorandum.

(b) The district director will furnish the taxpayer a copy of the technical advice memorandum described in subdivision *(vi)(c)* of this subparagraph and the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum (including a copy of the version proposed to be open to public inspection and notations of third party communications pursuant to section 6110(d) of the Code). The preceding sentence shall not apply to technical advice

memoranda involving civil fraud or criminal investigation, or jeopardy or termination assessments, as described in subdivision *(iii)(j)* of this subparagraph or to documents to which section 6104 of the Code applies.

(c) In those cases in which the National Office advises the district director that he should not furnish a copy of the technical memorandum to the taxpayer, the district director will so inform the taxpayer if he requests a copy.

(viii) Effect of technical advice. (a) A technical advice memorandum represents an expression of the views of the Service as to the application of law, regulations, and precedents to the facts of a specific case, and is issued primarily as a means of assisting district official in the examination and closing of the case involved.

(b) Except in rare or unusual circumstances, a holding in a technical advice memorandum that is favorable to the taxpayer is applied retroactively. Moreover, since technical advice, as described in subdivision *(i)* of this subparagraph, is issued only on closed transactions, a holding in a technical advice memorandum that is adverse to the taxpayer is also applied retroactively unless the Assistant Commissioner (Technical) exercises the discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the holding. Likewise, a holding in a technical advice memorandum that modifies or revokes a holding in a prior technical advice memorandum will also be applied retroactively, with one exception. If the new holding is less favorable to the taxpayer, it will generally not be applied to the period in which the taxpayer relied on the prior holding in situations involving continuing transactions of the type described in §§ 601.201(1)(7) and 601.601(d)(2)(v).

(d) A district director may raise an issue in any taxable period, even though he or she may have asked for and been furnished technical advice with regard to the same or a similar issue in any other taxable period.

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